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9 CAPITAL ONE SERVICES LLC  
10 CAPITAL ONE BANK (USA) N.A.

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14 **UNITED STATES DISTRICT COURT**  
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 DREW HILL,  
17 Plaintiffs,  
18  
19 v.  
20 CAPITAL ONE SERVICES LLC, and  
21 CAPITAL ONE BANK (USA) N.A.  
22 Defendants.

23 Case No. 13CV1967 CAB RBB  
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29 *Assigned to Courtroom 4C*  
30 *The Hon. Cathy Ann Bencivengo*  
31 *Referred to the Hon. Magistrate Judge*  
32 *Ruben B. Brooks*

33 **DEFENDANT CAPITAL ONE BANK**  
34 **(USA), N.A.'S ANSWER TO**  
35 **COMPLAINT**

NOW COMES Defendant CAPITAL ONE BANK (USA), N.A., erroneously sued herein as Capital One Services LLC and Capital One Bank (USA) N.A. (hereafter “CAPITAL ONE”), by and through its counsel or record, Doll Amir & Eley LLP, and hereby answers the Complaint filed by plaintiff DREW HILL (“Plaintiff”) and alleges as follows:

## **INTRODUCTION**

1. Answering paragraph 1, CAPITAL ONE admits that Plaintiff alleges that this is an action for actual damages, statutory damages, attorney fees and costs. CAPITAL ONE further admits that Plaintiff alleges that CAPITAL ONE violated the Fair Debt Collection Practices Act (hereafter “FDCPA”), the Rosenthal Fair Debt Collection Practices Act, California Civil Code section 1788 *et seq.* (hereafter the “Rosenthal Act”), and the Telephone Consumer Protection Act (hereafter “TCPA”). CAPITAL ONE states that the FDCPA speaks for itself, and to the extent a response is required, CAPITAL ONE denies it violated the FDCPA. CAPITAL ONE further states that the Rosenthal Act speaks for itself, and to the extent a response is required, CAPITAL ONE denies it violated the Rosenthal Act. CAPITAL ONE states that the TCPA speaks for itself, and to the extent a response is required, CAPITAL ONE denies that it violated the TCPA. With respect to the remaining allegations, CAPITAL ONE does not have knowledge or information sufficient to form a belief as to the truth of these allegations, as they require a legal conclusion, and on that basis, denies, generally and specifically, each and every averment contained therein.

2. Answering paragraph 2, CAPITAL ONE does not have knowledge or information sufficient to form a belief as to the truth of these allegations, as they require a legal conclusion, and on that basis, denies, generally and specifically, each and every averment contained therein.

## **JURISDICTION AND VENUE**

3. Answering paragraph 3, CAPITAL ONE admits that Plaintiff alleges this action arises out of CAPITAL ONE's violations of the FDCPA, Rosenthal Act and

## TCPA.

4. Answering paragraph 4, CAPITAL ONE admits that Plaintiff alleges jurisdiction arises pursuant to 28 U.S.C. §§ 1391, 1337, 15 U.S.C. § 1692(k)(d), and 47 U.S.C. § 277 *et seq.* and 28 U.S.C. § 1367 for supplemental state claims.

5. Answering paragraph 5, CAPITAL ONE admits it does business in the state of California. CAPITAL ONE further admits that Plaintiff alleges this Court has personal jurisdiction over CAPITAL ONE in this matter. With respect to the remaining allegations, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

## THE PARTIES

6. Answering paragraph 6, CAPITAL ONE does not have knowledge or information sufficient to form a belief as to the truth of these allegations, as they require a legal conclusion and facts about Plaintiff to which it does not have personal knowledge, and on that basis, denies, generally and specifically, each and every averment contained therein.

7. Answering paragraph 7, CAPITAL ONE does not have knowledge or information sufficient to form a belief as to the truth of these allegations, as they require a legal conclusion and facts about Plaintiff to which it does not have personal knowledge, and on that basis, denies, generally and specifically, each and every averment contained therein.

8. Answering paragraph 8, CAPITAL ONE does not have knowledge or information sufficient to form a belief as to the truth of these allegations, as they require a legal conclusion and facts about Plaintiff to which it does not have personal knowledge, and on that basis, denies, generally and specifically, each and every averment contained therein.

9. Answering paragraph 9, CAPITAL ONE denies that Capital One Services, LLC is a debt collector under the FDCPA. CAPITAL ONE does not have knowledge or information to form a belief as to the truth of the remaining allegations

1 in paragraph 9, as they require a legal conclusion, and, on that basis, denies, generally  
2 and specifically, those allegations.

3 10. Answering paragraph 10, CAPITAL ONE does not have knowledge or  
4 information sufficient to form a belief as to the truth of these allegations, as they  
5 require a legal conclusion, and on that basis, denies, generally and specifically, each  
6 and every averment contained therein.

7 11. Answering paragraph 11, CAPITAL ONE admits that Capital One  
8 Services, LLC is a Delaware entity with an address of 1680 Capital One Drive,  
9 McLean, Virginia 22102. CAPITAL ONE further admits that Corporation Service  
10 Company- Lawyers Incorporating Service is Capital One Services, LLC's registered  
11 agent for service of process. CAPITAL ONE does not have knowledge or information  
12 to form a belief as to the truth of the remaining allegations in paragraph 11 and,  
13 therefore, currently denies, generally and specifically, those allegations.

14 12. Answering paragraph 12, CAPITAL ONE, denies that it, as a national  
15 association, is a Virginia entity. CAPITAL ONE further denies that 4581 Cox Road,  
16 Glen Allen, Virginia 23060 is its "principal place of business". CAPITAL ONE states  
17 that, under its articles of association, 4581 Cox Road, Glen Allen, Virginia 23060 is  
18 the address for CAPITAL ONE's main office. CAPITAL ONE admits that its agent  
19 for service of process is Corporation Service Company. CAPITAL ONE does not  
20 have knowledge or information to form a belief as to the truth of the remaining  
21 allegations in paragraph 12 and, therefore, currently denies, generally and specifically,  
22 those allegations.

23 **FACTUAL ALLEGATIONS**

24 13. Answering paragraph 13, CAPITAL ONE denies, generally and  
25 specifically, each and every averment contained therein.

26 14. Answering paragraph 14, CAPITAL ONE does not have knowledge or  
27 information sufficient to form a belief as to the truth of these allegations, as they  
28 require a legal conclusion, and on that basis, denies, generally and specifically, each

and every averment contained therein.

15. Answering paragraph 15, CAPITAL ONE admits that it called the identified number. CAPITAL ONE does not have knowledge or information to form a belief as to the truth of the allegations that the identified number is Plaintiff's cell phone and, therefore, currently denies, generally and specifically, those allegations.

16. Answering paragraph 16, CAPITAL ONE denies that Plaintiff fell behind on his account prior to July 31, 2012, and affirmatively states that Plaintiff fell behind in August 2012.

17. Answering paragraph 17, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

18. Answering paragraph 18, CAPITAL ONE admits that it attempted to call the identified number in an attempt to discuss Plaintiff's past-due account. CAPITAL ONE does not have knowledge or information to form a belief as to the truth of the remaining allegations in paragraph 18 and, therefore, currently denies, generally and specifically, the remaining allegations.

## **PHONE CALLS**

19. Answering paragraph 19, CAPITAL ONE admits that it attempted to call the identified number on August 31, 2012, September 1, 2, 4 through 6, and 11 through 18, 2012. CAPITAL ONE does not have knowledge or information to form a belief as to the truth of the allegations that the identified number is Plaintiff's cell phone and, therefore, currently denies, generally and specifically, those allegations.

20. Answering paragraph 20, CAPITAL ONE does not have knowledge or information to form a belief as to the truth of these allegations and, on that basis, denies, generally and specifically, each and every averment contained therein.

21. Answering paragraph 21, CAPITAL ONE does not have knowledge or information to form a belief as to the truth of these allegations and, on that basis, denies, generally and specifically, each and every averment contained therein.

22. Answering paragraph 22, CAPITAL ONE denies, generally and

1 specifically, each and every averment contained therein.

2 23. Answering paragraph 23, CAPITAL ONE does not have knowledge or  
3 information sufficient to form a belief as to the truth of these allegations, as they  
4 require a legal conclusion, and on that basis, denies, generally and specifically, each  
5 and every averment contained therein.

6 24. Answering paragraph 24, CAPITAL ONE states that it is continuing to  
7 research the truth of these allegations and, therefore, currently denies, generally and  
8 specifically, each and every averment contained therein.

9 25. Answering paragraph 25, CAPITAL ONE admits that it sent Plaintiff  
10 correspondence at a San Diego, California address. CAPITAL ONE states that it is  
11 continuing to research the truth of the remaining allegations in paragraph 25 and,  
12 therefore, currently denies, generally and specifically, those allegations.

13 26. Answering paragraph 26, CAPITAL ONE states that it is continuing to  
14 research the truth of these allegations and, therefore, currently denies, generally and  
15 specifically, each and every averment contained therein.

16 27. Answering paragraph 27, CAPITAL ONE states that it is continuing to  
17 research the truth of these allegations and, therefore, currently denies, generally and  
18 specifically, each and every averment contained therein.

19 28. Answering paragraph 28, CAPITAL ONE states that it is continuing to  
20 research the truth of these allegations and, therefore, currently denies, generally and  
21 specifically, each and every averment contained therein.

### 22 **TCPA**

23 29. Answering paragraph 29, CAPITAL ONE does not have knowledge or  
24 information sufficient to form a belief as to the truth of these allegations, as they  
25 require a legal conclusion, and on that basis, denies, generally and specifically, each  
26 and every averment contained therein.

27 30. Answering paragraph 30, CAPITAL ONE does not have knowledge or  
28 information sufficient to form a belief as to the truth of these allegations, as they

1 require a legal conclusion, and on that basis, denies, generally and specifically, each  
2 and every averment contained therein.

3       31. Answering paragraph 31, CAPITAL ONE admits that, to the extent it  
4 made telephone calls to Plaintiff, the calls were not placed for emergency purposes.

5       32. Answering paragraph 32, CAPITAL ONE does not have knowledge or  
6 information sufficient to form a belief as to the truth of these allegations, as they  
7 require a legal conclusion, and on that basis, denies, generally and specifically, each  
8 and every averment contained therein.

9       33. Answering paragraph 33, CAPITAL ONE states that the TCPA and the  
10 FCC's January 2008 Declaratory Ruling speak for themselves. To the extent a  
11 response is required, CAPITAL ONE does not have knowledge or information  
12 sufficient to form a belief as to the truth of these allegations, as they require a legal  
13 conclusion, and on that basis, denies, generally and specifically, each and every  
14 averment contained therein.

15       34. Answering paragraph 34, CAPITAL ONE denies, generally and  
16 specifically, each and every averment contained therein.

17       35. Answering paragraph 35, CAPITAL ONE denies, generally and  
18 specifically, each and every averment contained therein.

19       36. Answering paragraph 36, CAPITAL ONE denies, generally and  
20 specifically, each and every averment contained therein.

21       37. Answering paragraph 37, denies, generally and specifically, each and  
22 every averment contained therein.

23       38. Answering paragraph 38, denies, generally and specifically, each and  
24 every averment contained therein.

25       39. Answering paragraph 39 denies, generally and specifically, each and  
26 every averment contained therein.

27       40. Answering paragraph 40, denies, generally and specifically, each and  
28 every averment contained therein.

**FIRST CLAIM FOR RELIEF AGAINST CAP LLC**  
**(Violations of the FDCPA)**

41. Answering paragraph 41, CAPITAL ONE hereby incorporates by reference all of the preceding paragraphs.

42. Answering paragraph 42, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

43. Answering paragraph 43, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

**SECOND CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**  
**(Violations of the Rosenthal Act)**

44. Answering paragraph 44, CAPITAL ONE hereby incorporates by reference all preceding paragraphs.

45. Answering paragraph 45, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

46. Answering paragraph 46, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

47. Answering paragraph 47, CAPITAL ONE states Civil Code sections 1788.32, 1788.30 and 1788.17 speak for themselves. To the extent a response is required, denies, generally and specifically, each and every averment contained therein.

48. Answering paragraph 48, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

**THIRD CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**  
**(Negligent Violations of the Telephone Consumer Protection Act)**

49. Answering paragraph 49, CAPITAL ONE hereby incorporates by reference all preceding paragraphs.

50. Answering paragraph 50, CAPITAL ONE denies, generally and specifically, each and every averment contained therein.

1       51. Answering paragraph 51, CAPITAL ONE denies, generally and  
2 specifically, each and every averment contained therein.

3       52. Answering paragraph 52, CAPITAL ONE admits only that Plaintiff seeks  
4 injunctive relief. With respect to the remaining allegations, CAPITAL ONE denies,  
5 generally and specifically, each and every averment contained therein.

6       **FOURTH CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**  
7       **(Knowing and/or Willful Violations of the Telephone Consumer Protection Act)**

8       53. Answering paragraph 53, CAPITAL ONE hereby incorporates by  
9 reference all preceding paragraphs.

10       54. Answering paragraph 54, CAPITAL ONE denies, generally and  
11 specifically, each and every averment contained therein.

12       55. Answering paragraph 55, CAPITAL ONE denies, generally and  
13 specifically, each and every averment contained therein.

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## AFFIRMATIVE DEFENSES

NOW WHEREFORE, having answered the Complaint, CAPITAL ONE asserts the following affirmative defenses:

## **FIRST AFFIRMATIVE DEFENSE**

1. The Complaint fails to state a claim upon which relief can be granted against CAPITAL ONE.

## SECOND AFFIRMATIVE DEFENSE

2. Plaintiff failed to mitigate his damages, if any.

### THIRD AFFIRMATIVE DEFENSE

3. Damages or injuries, if any, suffered by Plaintiff are attributable to Plaintiff's own conduct, deeds, acts, words and omissions, and not to any conduct, deeds, acts, words or omissions of CAPITAL ONE.

## FOURTH AFFIRMATIVE DEFENSE

4. Plaintiff is not entitled to attorneys' fees.

## FIFTH AFFIRMATIVE DEFENSE

5. Plaintiff is barred from any legal or equitable relief under each of the purported causes of action in the Complaint, to the extent offsetting claim(s) exist.

## SIXTH AFFIRMATIVE DEFENSE

6. CAPITAL ONE alleges that the alleged actions of CAPITAL ONE were not accompanied by actual malice, intent or ill will.

## SEVENTH AFFIRMATIVE DEFENSE

7. No punitive damages are recoverable in this Action. Any award of punitive damages against CAPITAL ONE is unconstitutional.

## **EIGHTH AFFIRMATIVE DEFENSE**

8. Without waiver of any of the denials contained herein, CAPITAL ONE asserts that, if Plaintiff sustained any damages, which CAPITAL ONE denies, such

1 damages were proximately caused by the acts or omissions of other persons, firms, or  
2 corporations.

3 **NINTH AFFIRMATIVE DEFENSE**

4 9. CAPITAL ONE acted in good faith and that the acts, conduct and  
5 communications, if any, of CAPITAL ONE was justified.

6 **TENTH AFFIRMATIVE DEFENSE**

7 10. The TCPA provides for statutory damages of \$500 to \$1,500 for each  
8 violation of the law. When directed at telephone calls, statutory damages under the  
9 TCPA could quickly rise to thousands of dollars of damages for alleged actions that  
10 caused little or no actual damage to Plaintiff. Statutory damages would constitute an  
11 excessive fine or penalty without the substantive or procedural safeguards guaranteed  
12 by the Fifth and Fourteenth Amendments to the United States Constitution.

13 **ELEVENTH AFFIRMATIVE DEFENSE**

14 11. CAPITAL ONE acted in good faith and any violation by CAPITAL  
15 ONE of the statutes alleged in the Complaint was not intentional and resulted (if at all)  
16 from a *bona fide* error notwithstanding the maintenance of procedures reasonably  
17 adapted to avoid any such error.

18 **TWELFTH AFFIRMATIVE DEFENSE**

19 12. CAPITAL ONE acted reasonably and in good faith at all material times  
20 based on all relevant facts and circumstances known by it at the time it so acted.

21 **THIRTEENTH AFFIRMATIVE DEFENSE**

22 13. CAPITAL ONE is informed and believes, and on that basis alleges that  
23 it has complied with all applicable state and federal laws, statutes and regulations and,  
24 therefore, cannot be held liable for any alleged damages suffered by Plaintiff.

25 **FOURTEENTH AFFIRMATIVE DEFENSE**

26 14. CAPITAL ONE alleges that the causes against it are barred to the extent  
27 PLAINTIFF provided prior express consent, whether through customer agreements,  
28 written, or verbal statement or otherwise.

## **FIFTEENTH AFFIRMATIVE DEFENSE**

15. CAPITAL ONE reserves the right to allege and assert any additional and/or further affirmative defenses as become apparent to CAPITAL ONE during the course of litigation.

WHEREFORE, Defendant CAPITAL ONE prays for judgment against Plaintiff as follows:

- a. That the Complaint be dismissed with prejudice in its entirety;
- b. That Plaintiff take nothing by reason of his Complaint;
- c. That judgment be entered in favor of Defendant CAPITAL ONE;
- d. For recovery of Defendant CAPITAL ONE's costs of suit, including its attorneys' fees to the extent recoverable by contract or law; and
- e. For such other and further relief as the Court deems just.

DATED: October 21, 2013

# **DOLL AMIR & ELEY LLP**

By: s/ Hunter R. Eley  
Hunter R. Eley  
Attorneys for Defendants  
CAPITAL ONE BANK (USA) N.A.  
CAPITAL ONE SERVICES LLC  
Email: heley@dollamir.com

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **1888 Century Park East, Suite 1850, Los Angeles, California 90067**.

On October 21, 2013, I served the foregoing document described as **DEFENDANT CAPITAL ONE BANK (USA), N.A.'S ANSWER TO COMPLAINT** on the interested parties in this action by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

**SEE ATTACHED SERVICE LIST**

- BY REGULAR MAIL:** I deposited such envelope in the mail at 1888 Century Park East, Suite 1850, Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.
- BY FACSIMILE MACHINE:** I transmitted a true copy of said document(s) by facsimile machine, and no error was reported. Said fax transmission(s) were directed as indicated on the service list.
- BY OVERNIGHT DELIVERY:** I caused such documents to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressees. The envelope or package was deposited with delivery fees thereon fully prepaid.
- BY ELECTRONIC MAIL:** I transmitted a true copy of said document(s) via electronic mail, and no error was reported. Said email was directed as indicated on the service list.
- BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above addressee(s).
- BY CM/ECF:** I electronically transmitted a true copy of said document(s) to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the aforementioned CM/ECF registrants.

I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 21, 2013, at Los Angeles, California.

Diana Kang

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2

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